United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 30, 2004

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Friedrich & Dimmock 554-1450-0100
Case 4-CA-32225 554-1450-0800
554-1450-0875

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by unlawfully bargaining to impasse on the non-mandatory subject of removing its quality control positions from the bargaining unit. We conclude that the parties never reached impasse as to mandatory subjects of bargaining and, since the Union never made clear during negotiations that it would not negotiate over the Employer's quality control proposal, that the Employer also did not insist to impasse on that proposal.

FACTS

Friedrich & Dimmock (the Employer) manufactures scientific glass products and fiber optic cable at its Millville, New Jersey plant. The Employer and the Glass & Pottery Workers, Local 219 (the Union) have had a bargaining relationship for 30 years. As of May 1, 2003, the bargaining unit consisted of 21 employees, which included three quality control positions. As required by the parties' most recent contract, which was due to expire on May 5, the Union gave the Employer 60-day notice that it wanted to bargain for a successor contract.

On May 1, the parties held their first bargaining session. The Employer proposed deleting the quality control job classification from the bargaining unit. It also proposed deleting the "supervisor" clause (which prohibited supervisors from doing bargaining unit work), increasing the employee contribution for heath insurance premiums from 10% to 30% and for dental insurance premiums from 0% to 30%, deleting union dues check-off, removing the union security clause, and cutting wage rates for two years. In response to the Employer's proposal, the Union asked why the Employer sought to have the quality control positions removed from the unit, and told the Employer that its proposals "weren't going to fly." The parties ended the session by agreeing to meet the following day.

During the next session on May 2, the Union presented the Employer with a counter-proposal. The session included discussions about supervisors doing unit work and the amount of insurance premiums to be paid by the employees.

At a morning session on May 5, the Employer presented the Union with a new proposal which continued to include the removal of the quality control positions from the unit, the supervisor work clause, and other provisions that the Union had indicated would be unacceptable. The Employer stated that its proposals were based on a need for cost reduction and flexibility. The Union told the Employer that the issue of removing the quality control positions from the unit was a permissive subject of bargaining and that the Employer could not bargain to impasse over it. The Employer did not respond to that statement.

After taking time to review the Employer's latest proposal, the Union presented the Employer with a counter-proposal that modified its position on such things as wages, retirement and the 401(k) plan. The Union also made an alternative offer to extend the current contract. At that time, the Union told the Employer that it felt strongly about its positions on the quality control issue, union security and check-off, and supervisors performing unit work, and the Employer responded that it would get back to the Union on those issues. Thereafter, the Employer presented the Union with a counter-proposal agreeing to dues check-off, reducing the employees' insurance contribution by 10% from its initial proposal (i.e., employees would pay 20% of premium) and rescinding its regressive wage proposal. The Employer continued to include the removal of the quality control positions from the unit as part of its proposal and stated that it needed the positions removed from the unit and supervisors doing unit work in order to increase flexibility and reduce costs. The Union then offered a counter-proposal which, among other things, included increasing the employee insurance contribution to 15%. The Union also offered to withdraw its severance pay proposal if the Employer would withdraw its proposal to remove the quality control positions from the unit. The parties ended that day of negotiations by agreeing to extend the current contract by one day to May 6, and agreed that the next meeting would be on May 6.

On May 6, the Employer presented the Union with a counter-proposal agreeing to include the Union's union security clause if the Employer's supervisor work proposal was accepted. The Union continued to ask the Employer for an explanation as to why it needed the quality control and supervisor work provisions, stating that it "could not go to the membership and just say 'the company wants it.'" The

Union presented the Employer with a counter-proposal, which withdrew its severance pay proposal entirely but did not make any other changes from its previous proposal. The Union then asked the Employer for a final offer because it felt that negotiations weren't progressing adequately. The Employer then provided a final offer, which included movement in its position regarding union security, work breaks, and wages. In response, the Union asked again for an explanation of the Employer's stated need to remove the quality control positions from the unit. The Employer did not answer. Regarding the issue of supervisors doing unit work, the Union suggested that it be limited to allowing them to work as a way of keeping their skill levels current, allowing them to work when it was necessary to meet a deadline, or allowing them to work only in particular parts of the plant. The Employer acknowledged these suggestions but there was no further discussion about the issue. The parties ended the session by extending the contract until noon on May 7. The Union agreed that it would take a ratification vote and said, "if the people accept this offer, we have a contract. If they vote no, we will find out why, so we can bring those reasons back to you."

On May 7, the Union presented the employees with the Employer's final offer and with a ballot that had only two choices, to accept the company's offer or to reject it and strike. The Union explained that if the employees did not accept the offer, they would be on strike as of noon that day. The employees rejected the offer, and told the Union that they did so because of the removal of the quality control positions, the supervisory performance of unit work, and the increase in insurance premiums.

The Union later met with the Employer and explained the results of the ratification vote. The Union stated that the parties were at an impasse, and since the Employer was still insisting on removal of the quality control positions from the unit this would "probably result in a ULP." The Employer stated that when the parties met again, they would be starting from scratch with the whole contract. The Union's response was that it was ready to meet to talk about the three "strike issues," as the parties had agreed to all other issues. At noon on May 7, the Union began a strike.[1]

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[1] The parties eventually reached an agreement on a new contract several days after the strike began. The new contract included provisions that removed the quality control positions from the unit, set the employees' portion of their insurance premiums at 20%, and allowed supervisors to do production work. Regarding the quality control positions, the parties agreed that once a new job description was written for the position, the current

ACTION

We conclude that the parties never reached impasse as to mandatory subjects of bargaining and that the Union never made clear during negotiations that it would not negotiate over the Employer's nonmandatory quality control proposal, and therefore the Employer did not insist to impasse on that proposal.

In determining whether a bargaining impasse exists, the Board considers bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.[2] The Board also considers whether parties demonstrated flexibility and willingness to compromise in an effort to reach agreement.[3] Thus, the Board will find a genuine impasse in negotiations exists only when the parties are warranted in assuming that further bargaining would be futile, or when there is "no realistic possibility that continuation of discussion at that time would have been fruitful."[4] In short, the Board requires that *both* parties must believe that they are at the "end of their rope."[5]

A party to a collective-bargaining agreement may propose to bargain over the scope of the unit, a non-mandatory subject, but may not insist to impasse on that subject.[6] To insist to impasse on a non-mandatory subject

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quality control employees would be offered the new non-bargaining unit positions.

[2] Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

[3] Cotter & Co., 331 NLRB 787, 787 (2000), enf. denied sub nom. TruServ v. NLRB, 254 F.3d 1105 (D.C. Cir. 2001), cert. denied sub nom. Teamsters, Local 293 v. TruServ, 534 U.S. 1130 (2002); Wycoff Steel, 303 NLRB 517, 523 (1991).

[4] Cotter & Co., above, 331 NLRB at 787.

[5] Grinnell Fire Protection Systems Co., 328 NLRB 585, 585 (1999) and cases cited there; Larsdale, Inc., 310 NLRB 1317, 1318 (1993), citing PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).

[6] Taft Broadcasting Co., 274 NLRB 260, 261 (1985)("parties are free to set forth proposals concerning non-mandatory subjects of bargaining, but may not insist on those proposals to impasse").

is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."[7] However, parties may voluntarily and lawfully discuss and agree to permissive subjects.[8] Any party "ha[s] the right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum."[9]

Here, it is clear from an examination of the negotiations that the parties never reached impasse on mandatory subjects of bargaining, including the issues of insurance premiums and supervisory performance of unit work. With regard to the insurance issue, in its initial proposal the Employer sought to increase the employees' portion of the insurance premiums to 30%. The Employer later proposed to increase the employees' portion to only 20%, which led to the Union's counter-proposal of a 15% contribution. At the Union's insistence, the Employer submitted a final offer, which included the 20% contribution in insurance premiums. However, the Union told the Employer that if the employees rejected the offer, the Union would come back to the table with the reasons for the rejection. This signaled that the Union believed that additional discussions would be fruitful.

Moreover, although the Union used the term "impasse" during the May 7 discussion of the ratification vote with the Employer, the Union also stated that it was ready to

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[7] Detroit Newspapers, 327 NLRB 799, 800 (1999), quoting NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958), enf. denied, 216 F.3d 109 (D.C. Cir. 2000)). See Taft Broadcasting Co., 274 NLRB 260, 261 (1985)("in evaluating whether parties have insisted to impasse on a particular non-mandatory subject of bargaining, the Board [has] looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the non-mandatory subject of bargaining"). See also Don Lee Distributor, Inc., 322 NLRB 470, 471 (1996), enf'd 145 F.3d 834 (6th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); Walnut Creek Assoc., 316 NLRB 139, 139 n.1 (1995); Westvaco Corp., 289 NLRB 301, 306 (1988).

[8] See generally, Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971); Detroit Newspapers, 327 NLRB at 800, citing NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958) (statutory duty to bargain in good faith extends only to "wages, hours and other terms and condition of employment"). Inserted after subjects

[9] Detroit Newspapers, 327 NLRB at 800. See also Taft Broadcasting Co., 274 NLRB 260, 261 (1985).

meet to talk about the three remaining issues, which included the insurance and supervisory work issues. Thus, the Union did not clearly indicate that it believed the parties had reached the "end of their rope" regarding these issues.

Additionally, the Employer never gave an "ultimatum" that any contract would have to include the quality control proposal. Nor did it continue to insist on that proposal in the face of a clear Union rejection of the proposal. Thus, the Union never made clear, during negotiations, that it would not accept a contract containing the quality control proposal. Rather, from the beginning of the bargaining process until the last session, the Union appeared willing to at least discuss the removal of the quality control positions. Although the Union stated that it disliked the proposal, it continued to negotiate about the issue by seeking justification from the Employer as to why the Employer needed the positions removed so that the Union could justify the proposal to the employees. This conduct sent an unclear signal regarding whether further negotiations on the issue were off limits. We note that even after deciding to strike and declaring the existence of impasse, the Union told the Employer that it was still willing to discuss the "strike issues," which included the quality control proposal. In sum, the Union never made clear that it would not accept a collective-bargaining contract that included this proposal.

Accordingly, we conclude that this allegation should be dismissed, absent withdrawal.

B.J.K.